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THE MILITARY COURTS OF PARIS

INCLUDING A COMPARISON OF THE PROCEDURE OF THE MILITARY COURTS OF FRANCE AND OF AMERICA.

ROBERT FERRARI¹

The procedure of the Military Courts of Paris has been rarely described to American readers. The procedure itself is important from the military point of view, and at the present time the Military Courts of Paris are a reflection of the social and military life of the time. A spectator not only sees what the military code punishes, but he also sees glimmerings and sometimes more of social life.

There are three military courts in Paris. Paris is not in the military zone, and the courts of Paris have jurisdiction only over offenses committed outside of that zone. The offenses that may be committed against the military code are numerous and varied, and illustrations of almost every violation of that code came to the attention of the courts of Paris within the time I attended their sessions. There is the first *Conseil de Guerre*—which is the French name for Military Court—the second and the third, all sitting in the *Palais de Justice*—the law courts—of Paris.

The composition of the court is as follows: There are seven judges, one president and six assistants. The presiding officer is a colonel. They act as judges of the facts and of the law. In addition, the president of the court acts as a combination of prosecuting officer and defender. The case that comes before the court has already been investigated by a *Rapporteur*, a person who acts as an investigator and who has collected the facts concerning the alleged crime. This *Rapporteur* makes a report, in which are expounded the facts of the case, the testimony given by the witnesses that have come before him, and his conclusions. It is upon the basis of this report confirmed by the investigation of the Judge Advocate, that a person is charged with a crime. The papers in the case are presented to the judges of the Military Court, to the prosecuting officer—the *Commissaire du Gouvernement*—and to the attorney for the defendant. The president of the tribunal has already read the *dossier*—that is, the case as it comes up from the *Rapporteur*—and is cognizant of all the facts. Having this

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knowledge he questions the defendant when he comes to the bar.

The French procedure is entirely different from ours. With us, a defendant may not be questioned. He may give testimony if he pleases, but there is no power which can compel him to give testimony. But under the French system a defendant is submitted to examination and cross-examination by the president of the tribunal. All the members of the court may question witnesses, but the president does nearly all the questioning. As a matter of practice, the president is almost always asked whether a certain question may be put. The president then either puts it himself, or turns to the defendant or the witness and asks him to answer. The attorneys have the large right to cross-examine, but they do not avail themselves of that right, to anything like the extent our lawyers do.

The examination by the president is most thorough. He is well acquainted with all the facts of the case, because the *Rapporteur* has gathered and reported the facts completely. So that the questioning of the President is intelligent and difficult to evade. The questioning is, in a large number of cases, not whether the act was committed, because the defendants who come to the bar usually admit their guilt, but whether there are any aggravating or extenuating circumstances.

The doctrine of extenuating circumstances in France is a curious doctrine. In the civil criminal courts the jury has a right—and in the Military Court the judges are the jury—to decide whether the facts set out in the indictment have been proved; and also, if they decide that these facts have been proved, whether there are extenuating circumstances in the case, to mitigate the crime. Extenuating circumstances are adduced in every case that comes before the military and the civil courts of France. Among us, if the facts set out in the indictment are admitted by the defendant, there is nothing else for the court and the jury to do but to convict. But in France admission of guilt of the facts set out in the indictment does not carry along with it the stopping of the trial and the immediate conviction of the defendant. The defendant, if he is declared guilty by a jury, may be declared guilty with extenuating circumstances; and the fact of the existence of extenuating circumstances will reduce the penalty. In the Civil Court, in special cases, the doctrine of extenuating circumstances leads to the acquittal of the defendant, French juries in this case acting as our own juries do in similar instances. Suppose the case of a person who has admitted his guilt so far as the facts of a crime are concerned. In an American court the defendant would be convicted without a trial. But in a French court, in spite of the admission on

the part of the defendant of the commission of the act, there is always a trial, because of the question whether there are any extenuating circumstances in the case. Extenuating circumstances mean any circumstances in the history of the individual which are likely to minimize the enormity of the offense. The term is very elastic, and the defenders make a great deal of this elasticity. The whole history of an individual is gone over and all the facts which may tend to mitigation of the gravity of the offense are brought forward in order to palliate that offense. Now, as a matter of law, extenuating circumstances do not allow of an acquittal; but in some cases the jury decides, counter to the law, and makes the extenuating circumstances sufficient for acquittal. Under the terms of the law, the jury ought, in a case where it is convinced of the existence of the facts charged against a defendant, to convict that defendant, and then, if it believes there are circumstances in his life which mitigate the crime, it ought to add its opinion of the existence of extenuating circumstances. The court, which receives the law from the criminal code ought then to say exactly what is to be done with the convict. But in some cases the jury overrides the law, and decides that the extenuating circumstances refine the crime to nothingness.

The other question involved in a trial in France, after admission of guilt, is that of aggravating circumstances. The facts showing these circumstances are adduced—in the very rare cases when they are presented—by the prosecuting officer. The attorney for the defendant, the president of the court and the prosecuting officer all adduce evidence of extenuating circumstances. In civil courts every case contains evidence adduced to mitigate the punishment. The same is true of the military courts, but aggravating circumstances are infrequent.

The military courts also apply the doctrine of suspension of sentence, and the suspension of the execution of sentence, as the result of a finding of extenuating circumstances. This is called, in France, the "Beranger Law," which bears the name of the senator who introduced the bill for the law into parliament and who by his eloquence convinced the country of the necessity of such a law; or the "Law of Sursis." It is equivalent to our probation laws. An individual convicted by a court, military or civil, may in the discretion of this court, be allowed to go free upon condition of good behavior and be placed under the care of what is equivalent to a probation officer. In France there is a provision for what is called "Surveillance," which is more rigid than our probation officer system.

The *Commissaire du Gouvernement* is equivalent to our Judge Advocate. He does not, as with us, present the case for the government. It is the president who, by his questioning of the defendant, and the other witnesses, presents the case to the jury, composed of himself and six other judges. The *Commissaire* very rarely questions any of the witnesses. His function appears when all the evidence has been brought forth. He then makes a summing-up speech, called the "requisitoire," in which he sets out all the facts, draws the deductions, applies the law and counsels the court what to do. Under our system, we have a conflict between one side and the other, between the prosecutor and the defender. But under the French system, in practice—because in theory both the civil and the military courts of America have prosecuting officers, who are quasi-judicial officers—the district attorney, in the civil court, or the *Commissaire du Gouvernement* in the military court, is an actual, living, operating quasi-judicial officer. He presents not only the case against the defendant, but also the considerations in his favor.

The attorney for the defendant, on the other hand, presents the case only for the side of the prisoner. But the fairness and the dignity of his attitude are worthy of imitation by our practitioners in cities. Usually in the military courts there is very little for him to do, except to speak concerning the extenuating circumstances in the case; and this he does with a great deal of art. He does not try to minimize or whittle away the crime as much as he tries to explain why the crime was committed. He hopes thereby to obtain a conviction with extenuating circumstances, and the application of the law of probation.

After the evidence is all in and the *Commissaire du Gouvernement* and the prisoner's counsel have made their summing-up speeches, the latter always having the last word, the president asks the defendant if he has anything to add to what has been said by his attorney. If he has not, the judges begin their deliberation at once. They retire and the vote is not by secret ballot, but by discussion, and by viva voce voting. There is a plan for the reform of this method of voting. It is said that the junior officers are terrorized by the senior officers into voting as the latter wish them to vote; or at least that the junior officers are induced to vote as the senior officers do. But, as a matter of practice, juniors are always allowed to express their opinions first. This fear of terrorization by superior officers is not well founded. Of course, seniors, and especially the president, may, in all sorts of ways, indicate their opinion, particularly during the course of the trial, and

thus influence their juniors. But as a matter of practice, I doubt that this is an inconvenience and a defect of the French system of military court procedure. It is ridiculous to assume that superior officers would be offended by a difference of opinion on the part of their inferiors. This is not true in the case of the civil judges, and it seems to be preposterous and offensive to think that the military officers are so thin-skinned and so stupid; and actual experience verifies this conclusion. The plan for the reform providing for secret voting has been introduced into the Chamber of Deputies, but I believe there is no possibility of the bill's going through.

The *Commissaire du Gouvernement* has already presented a list of questions in writing, which the judges take into their room to answer. The questions are of the following sort:

Is the defendant guilty?

Are there any extenuating circumstances in the case?

Sometimes the questions are very numerous, running up to fifteen or twenty; but usually they are three or four in number. When the judges have decided, they re-enter the court room. Everybody stands up; there are soldiers with fixed bayonets at the back of the court room, who then present arms. The president of the tribunal salutes; and every one in the court room does the same. He then reads the opinion of the court, beginning—"In the Name of the French People," and continuing with the questions put to and the answers made by the court.

An article² has recently appeared which is, I believe, the first exposition of the present day actual procedure of Courts-Martial of the United States. Theory of itself is nothing. We must see it in action to judge of its efficiency. And we must watch its deviations from practice. It is practice that decides the value of a system. The author criticises the delay and the uselessness of some steps taken. I wish to add my voice to his, and to make in addition the following observations.

The officer who investigates the case in the American procedure is appointed to hold a Summary Court-Martial. If he decides to forward charges, he sends these with "a statement of the substance of the testimony expected from witnesses, both for the prosecution and for the defense, and with other available information as to any probable testimony that may be developed."³

²Virginia Law Review, February, 1918, E. W. Carter.

³Ib., p. 332.

The Summary Court-Martial is evidently appointed for each case, just as the General Court-Martial, as we shall see later on, is. Why there should not be an officer designated to hold Summary Courts-Martial, why he should not be allowed to remain in office a sufficiently long time to learn his business, and why the officer should not, as far as possible, in order that he may learn this business, be relieved of all other military duty,⁴ are questions which must be answered satisfactorily to a long-suffering public, before this patient beast of burden will continue to give its sanction to the wasteful and futile methods of the army in this aspect of its activities.

In France the *Rapporteur* is an expert. He is given a chance now, whatever the situation may have been twenty years ago, when great agitation for reform caused by the Dreyfus trials, took place, to develop skill and power in investigation and in presentation. The recent Bolo case, to give an example, was prepared by a Captain *Rapporteur*, who has for a long time now done nothing else but prepare cases for courts-martial. It is the same with the other two military courts of Paris. Each has an investigator and preparer of the evidence, assigned to that duty, and to nothing else. Likewise, if we may mention this here out of its natural order, for the sake of symmetry, the General Courts-Martial, that is, the trial courts, have assigned to them judge advocates, who devote themselves to the trial of cases, and to nothing else. This is efficiency. We Americans must learn, and this convulsing war makes the need more pressing, indeed vital, to utilize skilled men for skilled work. Democracy cannot work if it is to mean that any one is to be entrusted with any office. In this respect, division of labor or specialization must go farther.

Secondly, if the word "testimony" in the last line of the quotation from Major Carter means "evidence," which I believe the author intends, then the Summary Court-Martial in our country appointed to investigate a case and prepare charges for the General Court-Martial, corresponds almost exactly in function with the French *Rapporteur*. In the civil law in Anglo-American procedure, the prosecuting attorney and the police are the investigating authorities. But the trial court does not receive any evidence before the actual trial in open court. Our judge, as well as the jury, hears the evidence for the first time upon the trial of the action. But in the civil procedure in France, and generally in continental countries, the trial judge, if not the jury, is thor-

⁴"The Judge Advocate is seldom a man who has received any special training in his duties, or usually has not had much trial experience. His court-martial duties are in addition to his other military duties," *Ib.*, p. 333.

oughly familiar with the evidence for and against, to be adduced, or which may be adduced, to the trial court. In the military courts in continental Europe, the procedure is in essence the same as in the civil tribunals.

Our author is driven to admit that in spite of all the delays, vexations and inanities of the procedure in our courts-martial, he knows of no case, in nineteen months of experience as a Judge Advocate, where injustice has been done. And this with a relaxation of rules of evidence, which is inevitable in courts-martial. What becomes then, of our vaunted Anglo-American civil criminal procedure, to which we have bowed in adoration these continuing centuries? What becomes of the shafts, the quips and quirks at the expense of the continental civil criminal procedure? Our rules of evidence, and our procedure before, during and after trial, are the result, none too happy, of our distrust of the jury and of the layman. What a commentary is this distrust upon the eulogiums of the jury. The truth of the matter is that the defendant had to be protected against the bias, the lack of experience, and the stupidity of juries, and judges in their wisdom have rushed to the assistance of prisoners—as well as of prosecutors; of defendants in a civil action in civil law, as well as of complainants in such an action.⁵ But jurors in courts-martial, to quote from Major Carter, are “experienced in handling the kind of men they try.” That seems to be more important than legal rules.

A summary of the extenuating circumstances is sent, with other papers, to the trial court—the General Court-Martial—by the officer exercising command over the Summary Court-Martial, if he believes the case should be tried by General Court-Martial.⁶ The General Court-Martial, has the extenuating circumstances before it, just as the French Court-Martial has, and as the civil court in France and other continental countries has. This procedure in our Courts-Martial is better than that in our civil courts. It saves time: both issues, namely, the facts of the commission of the act alleged to be criminal, and the circumstances that mitigate the act, if it has been committed, are at the same time presented to the court.

There is delay in the organization of the court. The Judge Advocate swears the members of the General Court-Martial, the president of the court in turn swears the Judge Advocate, and the Judge

⁵On the general subject of Anglo-American civil criminal procedure compared to the French, see my article “The procedure in the Cour d’Assises of Paris.” *Columbia Law Review*, January, 1918.

⁶*Va. Law Rev.*, p. 332.

Advocate, again, swears the stenographer. This proceeding is gone over each time a case is to be tried. What a pitiable waste of valuable time! And in the army, too, where we can least afford this drain upon our forces. The Paris courts which I have seen in action use the sensible methods of the civil courts in all civilized countries: They swear the officers of court at the beginning of their functions for all cases that may come before them.

The American court examines the witnesses after the prosecution and defense have finished with them. Not only the president but the other members of the court question.⁷ The author of the article objects to the repetition of questions and of information due to the lack of skill or inattention of the members of the court. In France there is no such waste of time, and confusion of issue. The president does practically all the questioning and cross-questioning. The other members of the court rarely take part; not because they are lacking in attention or competency, but because the examination by the president is so thorough. The American president, ought to be just as thorough, for he has had the dossier, to use a French term, in other words, the case, and has therefore had an opportunity to familiarize himself with the matter.

"Another serious cause of delay in courts-martial is due to the fact that on every legal point raised, for instance, a point involving the admissibility of evidence, the court must be closed, every one cleared out, except the members of the court, a vote taken as to what the ruling should be, the court opened again and its ruling announced."⁸

At this rate, judging from the number of objections made in the ordinary trial in the civil court, the sessions of the courts-martial drag on till judgment day. This is what rules of evidence lead to, when they are unintelligently employed and when attorneys have little sense of responsibility. The rules of evidence, the "Manual for Courts-Martial" tell us,⁹ are for the purpose of doing justice to the prisoner, to the army, and to the state. It would be better to abolish all rules of evidence than to continue the extravagant procedure now observed. After all we have been permitted to see of the continentals of Europe, no one is so puerile as to believe that because they do not employ any rules of evidence, in our sense, they are unjust in their trials. It would be dangerously erratic to believe that justice can be done only

⁷Va. Law Rev., p. 333,

⁸Va. Law Rev., Art. Cit., p. 334.

⁹"A Manual for Courts-Martial." Government Printing Office, Washington, D. C., 1917.

under our Anglo-American procedure with our intricate system of rules, often unjust in theory, and perilous in action; and that during all the years that free proof has been the order of the day in continental civil and military courts, justice has been unseen. On the contrary, my experience of hundreds of cases in courts-martial and in civil courts in France—and I believe France to be typical of the other nations which have her system of free proof, that is, no law of evidence to trammel the coming-out of facts—has convinced me that the result in spite of all the confusion I have criticised in the article above mentioned, is better there, where they are burdened with no system of evidence. The result is better from the point of view of the eliciting of important facts, and from that of the saving of a world of time. Rapidity and justice is the rule, as I have seen these European courts in operation.

Indeed, why any rules at all before such a jury as Major Carter describes. They are “experienced in handling the kind of men they try, understand their psychology, and know the elements of the offenses without instruction?” What other qualifications do we require of judges? Experience of the individual before the bar, and knowledge of the law: are these not sufficient? If they are, then why shackle the judges with incomprehensible rules, difficult of application, at all times, and sometimes unjust in their application. If, as I have said, judges invented rules of evidence to protect litigants and prisoners against the inexperience and the prejudices of juries, the invention is out of date now.

But if we retain the rules of evidence, cannot we be more practical? In the civil courts, whenever more than one judge sit, the president usually decides points of law, including objections to the introduction of evidence. When consultation is needed, it is had on the spot, and a decision reached immediately after short communication, and without the court’s being cleared. Why cannot the courts-martial do the same? Is this our vaunted efficiency? Is this an example of our efficiency in this war?

In French courts there may be objections to testimony. In this event, the other side has the right to be heard, and the judges retire to deliberate. But these objections to testimony are so rare that in two hundred cases—one hundred in the military courts and one hundred in the Cour d’Assises—the Civil Criminal Court for the trial of felonies—and other cases in the other courts for the trial of misdemeanors and for violations of ordinances, I saw objections made only once. The objection must be made in writing; but an assistant usually prepares

the "conclusions," as the objections are technically called, and no time is wasted.

After the evidence is in, "the court is closed and a vote taken, beginning with the junior officer in rank, on each specification and charge."¹⁰

The judgment is, therefore, arrived at not by discussion, but by the members casting their votes for or against conviction, upon the closing of court.

This is incomprehensible. What is the purpose of number in the judge's seat? One would believe it is security for the defendant and justice for society. In the civil courts there are sometimes several judges in trial and in appellate courts. But what security is there for the defendant or for the commonwealth if each man is to make up his mind with the help of the evidence adduced and commented upon, and without the great assistance of discussion among themselves. All experienced men know that some judges of a fact—I do not now refer to law judges only but to all to whom questions of fact are submitted for determination—take greater interest in the discussion *en famille* than in formal presentation. And almost all men are aided in thinking straight by a comparison of their views with those of others. Indeed, the very discussion, the heat of the fray, the beating of the hammers of thought and words upon the anvil of the mind, elicit sparks of light which illumine the case as nothing else could do. I discuss the question of the influencing of junior officers by seniors elsewhere in this article. I do not believe that possibility—of some officers being influenced by others—should prevent a discussion.

After the vote has been taken "the court is then opened and the record of service and former convictions is read; the court is then again closed and a sentence voted."¹¹

Our twentieth century fetich, handed down to us from tyrant-ridden times, and preserved intact till this newer day—overconsideration for a prisoner, and under-consideration for society—grips us with claws of a hawk. In ordinary times, we, under our Anglo-American procedure in criminal law, do not enough stand sentinel before the towers of society. We allow the individual to ride rough-shod over elemental forces of nature. We stand aside and allow him to play with us, to cajole us, to mock us, to scorn us. In our impotence, caused by our own stupidity—we call it, to salve our conscience, tenderness and compassion—we lie prone to the assaults of offenders

¹⁰Art. cit. sup. at 334.

¹¹Va. Law Rev., Art. Cit., p. 334.

against law. We must not allow the record of former convictions to go into a trial; oh no! not this. It may prejudice the minds of the jury against the poor devil at the bar. We are much more human than that! Some states have become emancipated—New York, for instance. This state does not allow the introduction during trial of evidence of an arrest, but it does permit the introduction of evidence of a conviction. But the military courts, above all others, to stick to a tradition, hoary with accumulated moss, and moribund in the civil tribunals! This is too much. One can hardly believe it. This is not the treatment we are accustomed to by the military. All experience negatives the strict adherence to rules in military tribunals, no matter how loudly manuals speak in a contrary sense. Even our government manual, so partial to rules of evidence, so solicitous of doing justice as near as possible as the civil tribunals do, makes the discretion of the court-martial the final arbiter of its procedure.

What does this discretion mean? This war has shown, if ever it can be shown, that constitutional safeguards are straw when the supposed interests of the government are endangered—I do not say the interests of the commonwealth. It has shown clearly, forcibly, and ignobly that courts will interpret constitutional provisions against the individual, and in favor of the government then in power, the policies of which may tomorrow change, and which may be supplanted by another government that may demand contrary interpretations which will be kindly and servilely furnished by the courts. There is one name, however, that will never be forgotten so long as people love truth, liberty and justice—who love these qualities even in war time, love them in opposition to the wishes and the stern demands of army or government, love them even when the state is supposedly or actually in peril of destruction by a superior physical power—and that name is Lord Shaw of England. He is always found on the side of a free spirit of inquiry, a large liberal attitude toward the individual, sometimes hard pressed by governments in power, a vigorous opposition to all that is domineering in government. And in general it may be said that English courts have stood the strain well. Would that we could say the same of our own courts. Constitutional safeguards will splinter like dried timber under the pressure of circumstances. We have already seen it in this country. In this country, above all others our exhibition has surprised us, not that we had any illusions concerning our greater liberty and freedom, but that we had no imminent propulsive force driving us to shatter our traditions, to burn our books, and to annihilate our liberal spirit.

To answer directly the question implied in these remarks: Does any one think that this careful guarding of a soldier's rights, if it be guarding, to the extent of requiring no revelation during trial of a previous conviction, will not in practice yield to the imperative necessities of the situation? And this yielding will happen just in those cases where the unalterable fixity of the safeguarding rules, is most categorically demanded.

"The method of arriving at a sentence is for each member of the court to write on a slip of paper a proposed sentence. The sentences thus proposed are voted upon beginning at the lowest sentence proposed."¹²

The argument against voting this kind of sentence is that against voting a judgment of conviction without discussion. But there is more. In the case of a voting for or against conviction, the majority decides against the prisoner. In the case of sentence, however, although externally the majority vote seems to determine the sentence, it is really in some instances a single vote that decides what it is to be. For, each sets down the sentence. Each, we will suppose, has set down a different number. Without discussion, without rhyme or reason, the sentence they agree upon a number, that is, a majority is in favor of that number. Without discussion, whether rhyme or reason, the sentence is decided upon, and it is determined by the original single individual who first suggested the sentence! The final decision may be controlled by one or more votes, less than an original majority, given on the first balloting. We have all denounced the aleatory balloting of juries.

I give the following table, in parallel columns, which shows the procedure in the military courts of France, and of the United States; and I include some comparisons with the civil criminal courts.

FRANCE	UNITED STATES
<i>Preliminary Investigation</i>	
Made by a Rapporteur and by a Commissaire du Gouvernement, who collect the facts and determine whether there is sufficient evidence against the defendant to go to trial on. Perform a function similar to that of the juge d'instruction in civil criminal procedure.	Made by a Summary Court-Martial, the equivalent of an inferior Court Magistrate.

Charge

- | | |
|---|----------------------------|
| 1. Facts and evidence are both set out. | 1. Facts only are set out. |
|---|----------------------------|

¹²Va. Law Rev., Art. Cit., p. 334.

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Service of Charges

Obligatory.

Same.

Trial

Court—Its Composition

Seven judges.

Five to thirteen; the latter number is preferable unless there be manifest injury to the service if that number be convened.

Pleas

Pleas in bar and in abatement may be taken advantage of at any time before the completion of the examination by the president of the prisoner. The examination of the latter is obligatory under the law, after the reading of the charge, of the order to try the defendant and of the order convening the court.

The charge and the order convening the court are read. Pleas in bar and in abatement are now in order, and must be taken advantage of at this time to be effective. The examination of witnesses follows.

Other Officers of Court

1. Commissaire du Gouvernement.
2. Counsel for the prisoner.
3. Clerk.

1. Judge Advocate.
2. Counsel for the prisoner.
3. Clerk.

Joint Defendants

Permissible.

Same.

Challenges Against Membership of the Court

Allowable.

Allowable.

Oaths

Obligatory for members of court, judge advocate and witnesses. Court may also hear statements not under oath—à titre de renseignement. No conviction, however, on such statements.

Same. Court may receive statements not under oath. No conviction can be had on such statements unsupported by evidence under oath.

Rules of Evidence

Free proof. Everything admitted, as a rule. The procedure is the same as that in the Civil Criminal Court.

The rules of evidence of the civil courts prevail, *where possible*. This gives our Military Courts wider latitude, even to venturing into the realm of free proof, though this, it is said, is not done in ordinary practice. The President determines the

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procedure by regulation. This regulation may contravene the body of the law of evidence. Our procedure departs more from civil criminal procedure than the French does.

Evidence of Good Character of the Defendant

Allowable always, and without restrictions.

Admissible; though the admission of it subjects the defendant to having evidence of his bad character introduced. See below.

Evidence of Bad Character of the Prisoner

Admissible always, at any time, by the prosecution.

Not admissible by prosecution unless defendant has already adduced evidence of his good character. Exception, where motive, intent or design is to be proved.

Freedom from Self-Incrimination

Theoretically, in the civil courts, the prisoner cannot be compelled to give testimony against himself. Practically, however, if he does not speak, inferences will be drawn against him. He, therefore, always speaks.

In the military courts, examination of the defendant is provided for by law. (See above, *Pleas*.)

In the civil criminal courts the judge instructs the jury not to take into consideration against the defendant his non-appearance on the stand. In theory, the jury does not hold against the defendant his remaining silent. Experience shows, however, that in some cases, if not in many, the jury is troubled by the prisoner's silence and makes him pay for it.

In military courts the silence of the defendant bodes ill for him. The discretion of the court is usually, I should think, directed against the man who does not speak, and will not explain when he might. The military mind is more direct and vigorous than the civil.

Hearsay Evidence

Admitted.

Not admitted. Exceptions: Confessions, admissions against interest, dying declarations, *res gestae*.

Evidence of Conspirators and Accomplices

Evidence freely admitted for and against a defendant.

Evidence of any conspirators or accomplices admitted against any of

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the others, unless the statement was made after the abandonment of the conspiracy. Evidence in favor of a defendant admitted only if part of the *res gestae*.

Privileged Communications

(a) Between Attorney and Client

Not admitted.

Not admitted.

(b) Between Physician and Patient

Not admitted. In the civil courts the interpretation by the Cour de Cassation—the Supreme Court of France—of Article 378 of the Penal Code makes a crime the revelation, by a physician, of a privileged communication to him by a patient. Other privileged communications are those to notaries, midwives, pharmacists, priests.

Admitted. The rule in the military courts is different from that in the civil courts. But why should not the rule be changed in these? Our procedure in the military courts is more logical, and in harmony with public welfare than the French.

Memoranda

Allowed to refresh recollection, though the French are less partial to this than we. When the witness is present, his free testimony is preferred.

Allowed to refresh memory. We put greater restrictions about the introduction of written testimony than the French and try harder than they to bring the witness before the court. But once there we are more liberal in giving him scope in respect to aids to memory.

Previous Knowledge of Facts of Case by Judge

Judges, especially the president, are familiar with the facts of the case. The dossier has been studied by them.

The judges may become cogniant of the facts of the case.

Witnesses Examined Apart from One Another

The rule is obligatory here. The practice is invariably to prevent any witness from being present at the examination of another witness who is preceding him in the giving of testimony.

The rule is discretionary.

Are Witnesses Kept Apart from One Another While Waiting to Give Their Testimony?

No.

No.

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Order of Proof

I. General Order

1. Reading of charges by the clerk of the court.

2. No opening by prisoner's counsel.

3. Questioning of the defendant and the bringing out of the facts of the case, for and against. This is done by the president of the tribunal. More evidence presented against defendant by witnesses called and otherwise. Rebuttal evidence by defense.

4. Presentation of evidence by the defendant.

5. Rebuttal evidence by prosecution.

6. In this case and in that of rebuttal evidence in steps 3 and 5, the matter may be introduced at any stage of the testimony of a witness, or at any stage of the presentation of any other kind of evidence.

7. Summing up by prosecution.

8. Summing up by prisoner's counsel. Though the government attorney may have the opportunity for rebuttal the defendant always has the last word.

9. Verdict by at least five against two. Junior officers during deliberations asked their opinions first.

1. Reading of charges by judge advocate.

2. Opening of the case by the prisoner's counsel.

3. Presentation of testimony and other evidence by the judge advocate.

4. Presentation of evidence by defendant, after opening. The opening of the defense may also come immediately after that of the prosecution.

5. Rebuttal evidence by prosecution.

6. Rebuttal evidence by defense.

7. Summing up by defense.

8. Summing up by prosecution. The government has the last word.

9. Case to jury, and verdict by majority. In death sentence by two-thirds vote. Junior officers express in practice their opinions first.

This order—1 to 9—is not in the United States, as we know, obligatory. It is the practice, however, except in extraordinary cases, where the judge may allow in the interests of justice the introduction of evidence quite out of its natural order.

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Order of Proof (Continued)

II. Individual Order

1. Examination by the president of the court. The witness is first asked to depose, i. e., give his testimony in his own way unhampered by anyone. After this deposition he is asked questions by the president, rarely by the other judges, and rarely by the government attorney or by prisoner's counsel.

2. Cross-examination is rarely taken advantage of, though the right exists to question witnesses directly.

Cross-examination may take place before direct examination is finished, interruptions during the direct for cross-examination are allowed, and comments upon the evidence adduced, as it is adduced, are permissible to the attorneys, the judges and the prisoner.

3 and 4. Rebuttal allowed at any-stage of the examination or cross-examination of witnesses.

1. Examination of witnesses by question and answer by prosecuting attorney, or defense.

2. Cross-examination by prisoner's counsel, or by prosecution.

3. Rebuttal by government or defense.

4. Rebuttal by defense or government.

Method of Giving Evidence by Witnesses

By deposition. The witness is to be free and untrammelled to express himself on the case. He may give not only facts, but opinions on these facts.

By question and answer. Facts only, and, except in a few well-defined cases, opinions.

Rules of Competency of a Witness

More strict in France than in our country. For instance, the following heirs and next of kin of the prisoner are disqualified from being sworn; but they may be heard "à titre de renseignement," that is, in order to give information to the court as a statement, and not as sworn testimony: grandfather, grandmother, father, mother, sons, daughters, husband, wife.

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Contempts

Provision for punishing for. Same.

Records

Provision for keeping. Same.

Speedy Trials

Provisions for. Provided for.

Depositions

Admitted. The trial before the jury is to be with oral proof, that is, testimony of witnesses is to be adduced, as far as possible. The same rule governs our procedure. But both in the military courts and in the civil criminal courts, in practice, written evidence is admitted more freely than it is among us.

Same. More safeguards in their admission here.

Leading Questions

Allowed. Not allowed.

Presumptions of Law

Employed. Same.

Presumptions of Fact

Used. Same.

Ignorance of Law Does Not Excuse

- | | |
|---|---|
| <p>1. Provisions concerning the maxim are here similar to those in the United States.</p> <p>2. Certain circumstances cause mitigation of penalty or excuse of crime.</p> | <p>1. Maxim prevails.</p> <p>2. Certain circumstances lead to extenuation, or excuse.</p> |
|---|---|

Ignorance of Fact—Does It Sometimes Excuse?

Yes. Yes.

Judicial Notice

Exists in French military law. Exists.

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What Facts to Be Presented to Court?

Aggravating and Extenuating Circumstances

All the facts of the case are to be adduced, not only those that are admitted in a civil criminal trial among us. We present the bare, bald facts of the act. Was the particular act which the penal code stigmatizes as a crime committed by the defendant? That is our question in Anglo-American procedure. But the civil criminal courts of France and the military courts, also, have presented before them, during the trial, not only the simple facts of the act charged as a crime, but all the surrounding circumstances, using these latter two words in their broadest sense, namely, as meaning all circumstances which may throw light upon the act, those of the time of the crime, and those at any other time in the life of the defendant.

In Anglo-American civil practice only the facts of the act charged as a crime are admitted. Those circumstances in the life of the individual which would explain, and aggravate or extenuate the act are not adduced, except by indirection and contrary to the spirit of the law. The jury is to decide upon the commission of the act charged as a crime. The judge is to determine the punishment. In reaching a determination as to the punishment to be inflicted the judge has the right to call for the production of evidence, at least, in extenuation; and this call is not in this case denied, because it is for the benefit of the convict. But ordinary procedure does not reveal the practice on the part of the judge of calling for evidence even in extenuation. The production of such evidence he leaves to the vigilant counsel for the prisoner. In states where the probation system prevails the judge receives under the law, and as of course, the report of the probation officer which assists him in determining the punishment. In France the introduction in the *trial itself* of a case, of evidence in extenuation is obligatory upon the officers of the court. This is true both for the military courts and for the civil criminal courts. Our military court procedure allows the introduction during the trial of aggravating or extenuating circumstances, and it is therefore similar to that of France in its military and civil aspects. In this regard our procedure in courts-martial is more conducive to justice than in our civil criminal courts.

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Appeal

The authority to which the case is brought on appeal is another court made up of five judges. It may modify a finding or a sentence. This is similar to the power of the Appeal Court in misdemeanor cases in the civil criminal law. The latter law is superior to our civil criminal law in this respect. Our appeal courts have no power to change a finding of fact or a sentence, and to order the execution of the sentence as amended. They have power only to affirm or reverse, in which latter case the matter is sent back for a new trial.

There is no such thing as an appeal in our military law, for the trial court is only an advisory body. The appointing authority has power to approve or disapprove, and this includes the power to change a finding of fact, and modify a sentence. In this respect American military law is superior in effectiveness and justice to American civil law. The American "Appellate Court," that is, the "appointing authority," has, however, the power to decrease a sentence, but not to increase it.

Power to Suspend Sentence or the Execution of Sentence

The French trial court has this power. The Beranger law, or probation law, is in force here as in the civil courts. The court is not only empowered to receive evidence in extenuation of the crime alleged, but is directed to do so.

The American trial court has not. The revising authority alone can suspend a sentence or modify it in any way. Exception, where sentence is of death or of dismissal of an officer. The American general court-martial is a recommending body. The French general court-martial—the Conseil de Guerre—is a disposing body.

Evidence Must Be Introduced While Court Is in Session

Rule here is binding. A great deal of the trouble and confusion in the Dreyfus case came from the fact that at the first trial at Rennes the court retired to deliberate and then received information which decided it to convict the defendant.

Binding.

Burden of Proof

On the prosecution. But there is no rule of reasonable doubt. The rule that governs is the same in military courts, and in the civil and criminal branches of the civil law—preponderance of evidence.

Reasonable doubt. In practice there is no difference between the French and American rule for conviction. Our rule has led to an abundance of judicial definition. But what has it led to in the practice of judges with powers of a jury, and with juries? To convic-

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tion of a defendant whenever the balance of evidence was against him.

Deliberation of Judges

1. Behind closed doors.
2. Juniors in rank vote first.
3. Members are equal.
4. Tie vote means a negative.
5. Five or more must be against the defendant. If he has three votes out of seven he is acquitted.
6. Disclosures prohibited.
7. Viva voce voting obligatory. No secret balloting.
8. The *dossier* may be used. This may not be used by the jury in the civil criminal court.

1. Must be behind closed doors.
2. Voting must begin with juniors in rank.
3. All members are equal.
4. A tie vote is a vote in the negative of any proposition.
5. Convictions and sentences are made by a majority vote, except when the penalty is death, the vote required being then two-thirds.
6. Disclosures of proceedings are prohibited.
7. No provisions for secret balloting or viva voce voting. "Members of a general or special court-martial, in giving their votes, shall begin with the junior in rank."¹³ The practice is to vote secretly.
8. All papers may be used by military and by civil criminal jury.

Sitting With Closed Doors

Allowable, and sometimes done, e. g. in treason, spy cases, generally.

Court-martial authorized to sit with doors closed to the public. But court-martial in this country, it is said by the authoritative "Manual" of the government, "are almost invariably open to the public during the trial."¹⁴ Exception given where the offense was of a "scandalous nature."

Possibilities of Judgment

1. Acquittal.
2. Conviction.
3. Conviction with aggravating circumstances.
4. Conviction with extenuating circumstances.

All possible, except 3.

¹³A Manual for Courts-Martial. Government Printing Office, Washington, D. C., p. 46. The annual is not clear upon the method, but the practice is as stated in the Table.

¹⁴P. 47.

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5. Absolution; that is, acquittal because the act alleged to be a crime is not punishable.

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Contumacy

If a defendant is never arrested or is arrested and evades a civil or a military court for trial, he may be tried in France and in other continental countries, but there are lenient provisions for reopening the case.

Anglo-American procedure knows no such process as contumacy. The prisoner must be before the court in order that he may be tried.

Default

If a defendant does not appear he may be tried by default.

Default is known only to our civil procedure in the civil law, and not to our criminal procedure.

THE PROCEDURE PRELIMINARY TO TRIAL BY COURT-MARTIAL.

The procedure before trial is assimilated in the two countries to that in the civil courts. The commander, however, occupies a unique position. He is the appointing authority of the Court-Martial, of the investigator, and of the indicting body. In the French civil procedure in criminal cases the *Chambre de mise en accusation* is the indicting body, and is equivalent to our grand jury. However, it has no power of appointment of the investigating authority any more than our grand jury has. In France the preliminary investigation is performed by a *juge d'instruction* in the civil law, and in the United States usually by a public prosecutor, sometimes by a magistrate sitting in an inferior court and having final jurisdiction over some misdemeanor cases, and over other cases, especially felonies, having only power to hold the defendant for trial by a superior court. In military procedure in France the Rapporteur, who acts as a *juge d'instruction* investigates, reports, and holds for trial by a court; while in the procedure in our Courts-Martial, the Summary Court-Martial investigates and reports and holds, if this last be necessary, for trial by a higher court. In both cases in military law the investigating authority sends up not only information gathered, but opinions and recommendations. In French civil procedure the investigating body gives not only facts but his opinion on the facts, and his recommendation, which may or may not be accepted by the indicting body. In our civil procedure only facts are sent up by the inferior court. The indicting body receives

information, and also *advice* from the district-attorney, who is also an authority for the gathering of information.

In France, the procedure from the beginning to the trial is as follows: The military or civil police, or a soldier or officer, makes a charge to the commander of the post. The commander sends the charges for investigation to a *Rapporteur*. This officer gathers the facts and sends these with his opinion and recommendation to the *Commissaire du Gouvernement*. This officer examines the *dossier*, and other evidence—he has the power of calling witnesses before him, as well as that of making other investigation—and sends the *dossier* to the commander. The commander appoints a Court-Martial, or sends the charges to a Court-Martial, if there be any permanent one. The trial is then held. In America, the same forces bring charges to the attention of the commander—the appointing authority of a Court-Martial—who sends the charges to a Summary Court-Martial for investigation and opinion. This court then makes a return to the commander, and the latter appoints a General Court-Martial, and sends to it the charges for trial.

The functions of the *Rapporteur* and the *Commissaire* are combined into one officer in our procedure—the Summary Court-Martial. The French system makes for more thorough preliminary investigation before trial; ours for more rapid action. But in most cases the *Commissaire* accepts the findings of the *Rapporteur* and gathers other evidence infrequently.

ILLUSTRATIVE CASES AND COMMENT.

1. A Tunisian had been on leave from the front, where he had distinguished himself for bravery. Not being used to the ways of civilization, and not understanding the French language, he got into trouble, and was now charged with having committed the crime of resistance to authority in the person of a *gendarme*, and of violence and rebellion. The Tunisian came into court, his head all bandaged up, presenting a pitiable spectacle. He was pale from wounds and from fright. The president questioned. The prisoner did not seem to be able to make head or tail of what the president was saying. The facts gradually came out: The defendant and a few of his Tunisian friends on leave from the front were walking in the streets of Paris. Some hooligans jeered at him, and threw his hat into the gutter. The Tunisian's blood was stirred, and he struck. While the fight was in progress, some policemen in civilian dress appeared. The combatants

were told to stop fighting, but there was no discontinuance of the conflict. In a little while, a *gendarme* in uniform came. In spite of the fact that he ordered the men to stop, the Tunisian continued to beat his opponents. The *gendarme* attempted to arrest the Tunisian, but the latter used hands and feet to prevent the arrest.

Here was an interesting case for the application of the doctrine of extenuating circumstances, and of the law of sursis. There was no question that the Tunisian had resisted authority. But the attorney for the defendant argued that he was a stranger in a strange land, that the customs of the Tunisians were different from the customs of the Parisians; that he did not recognize authority in civilian dress; that, even upon the appearance of the uniformed *gendarme*, the defendant did not know he had authority simply by the fact of his uniform; that he could not understand French; that the provocation had been great, and that his client's blood had been so stirred that his ire had not been able to subside immediately upon the coming of the officer; and especially that he had fought valiantly at the front and had received the *Croix de Guerre*. The judges recognized the services of the Tunisian to France, but thought that discipline and authority had to be respected. They convicted the defendant, sentenced him to one month in prison, but applied the law of probation, suspended the execution of the sentence, and allowed him to go free immediately.

2. Three defendants, a soldier in uniform, and a man and his wife. Ever since the beginning of the war civilians had made a business of buying old uniforms from soldiers and making them over and selling them. Although the business of these two people had continued in a flourishing condition they had not been arrested before. The military code makes it a crime to buy or to sell military clothing or military equipment of any sort. The judgment in this case was the following: The soldier was sentenced to imprisonment for three years; the woman for one year and the man for six months. The court decided that there were no extenuating circumstances in the case of the soldier, that there were extenuating circumstances in the case of the woman, and that there were more extenuating circumstances in the case of the man.

3. Threats of death made by a soldier to a woman. The charge was that three soldiers had broken into the private apartment of a woman. One of the soldiers had taken the other two along; going to the apartment because he enjoyed privileges there. Upon their arrival, they had found a great deal of merry-making and boisterous shouting. Several soldiers were in the apartment and our soldiers demanded admission. This was refused. Someone within shot off a revolver,

when the visiting musqueteers broke down the door, burst into the room, and took possession of everything. While the door was being broken down, the several men in the apartment escaped through a back door, with the mistress of the house. The three soldiers sat down to table, took everything there was in the room of an eatable kind, brought down the bottles of wine (which seemed to be very numerous in the household), and established themselves as if they were in their own home.

The court, in spite of the immorality of the woman in the case, was severe upon the soldiers. The court sentenced every one of them to prison, although there was a diminution of the penalty by the application of the doctrine of extenuating circumstances.

4. The following are two cases of desertion. Some of these are real cases of desertion, others are only technically such. A soldier was in Paris on leave, having his glass in a cafe. He made the acquaintance of a Swiss woman who had been married to a Frenchman, and who was now living in Paris. The woman invited him to her home. She was a woman of loose morals. She took a liking to this man because of his youth, and because of her perversity in bringing about the ruin of men. She seemed to take a devilish pleasure in teaching men whose acquaintance she made to drink hard, to smoke opium, and to take cocaine. This man succumbed. He became her lover, and an opium and cocaine fiend. He enjoyed the embraces of this woman for ten months, his family attempting in the meanwhile to tear him away. Finally—the cause of the final break between the woman and the soldier is uncertain, she saying that it was because she would not give him any more money, and he saying that it was because he wanted to give himself up to the military authorities and wanted to resume his position at the front. He presented himself to the authorities and was brought before the military court, charged with desertion. The *Commissaire de Police*, who is equivalent to our precinct captain of police, made a report to the military court concerning the woman. The report is an interesting document, and evokes the literature of romance. I shall, changing the names, set it out here in full:

“Richard Delaroché Trompette, husband of Augusta Jeanne Caroline Schweizer [the woman in the case], who was born on the 14th of December, 1874, at Lucerne, Switzerland, is a man of great fortune. He does not do anything for a living (*il ne fait rien*). The income he receives from his property is very enormous. He is an inveterate opium-smoker. In his apartment in the Rue de Turin there was a complete equipment of opium material, and it is there that he aban-

doned himself to this passion of his, in company with his wife. His wife, however, uses less opium than he. Madam Delaroche Trompette is a former dancer of the Moulin Rouge. She was very well known in this establishment under the *nom de guerre* of 'Jeanne d'Alma.' She is a woman of loose morality, who, by her art, was able to get her husband to marry her. As the wife of this man she has been living with him for eleven years, flaunting her mania and her vice. It is unquestioned that Richard Delaroche Trompette and his wife are opium fiends. The police raided the establishment on the 18th of March, 1916. The soldier in question, Rigetteau, was replaced in the affections of Jeanne d'Alma by another military man. Rigetteau, as the result of his connection with the Delaroche Trompette establishment, and no doubt by reason of the abuse of opium and cocaine, has become physically and morally sick. His family, one of the most honorable families in France, having become cognizant of the situation, endeavored to tear him away from the evil influence of the Delaroche Trompette couple, and to have him sent to Salonica."

The scene in court was dramatic. There was crimination and recrimination. The defendant blamed the Swiss woman. The Swiss woman blamed the soldier. The soldier said that his downfall was due to her. She said that she had nothing to do with his downfall and that he had wheedled a great deal of money out of her under pretense that he loved her. There was an open admission in court of the fact that she had been his mistress, as well as of the fact that she had been a great many other men's mistress. The defendant charged her with being the accomplice and the inducer of the desertion. The woman absolutely denied it. After the testimony of these two had been given, the *Commissaire du Gouvernement* made a strong appeal for the conviction of the defendant, in spite of the fact that he recognized he had probably been misled by the woman, who was a much older person than he, and intimated that a charge would very likely be laid against her as an accomplice. The judges retired for deliberation and came back with a verdict of "guilty," with extenuating circumstances. The woman was afterward charged with being the accomplice of the desertion of Rigetteau, and convicted.

5. A case of desertion of a different sort was "desertion a l'interieur." The defendant was a soldier who was in active service at the front. He was getting twenty-five centimes a day there. If he came to a munition factory in the rear he would get from three to ten francs a day. The president of the tribunal asked whether he had left the front because he would get more money, or because he

was afraid and wanted to be in a secure place. The answer was that he wished to make more money. At the beginning of his sojourn in Paris, he worked for a private individual for fifty centimes a day. This was doing a little better than he was doing at the front and he was in a secure place. But he left his boarding house without paying his board and lodging for fifteen days, and went to another *pension* kept by the sister of the landlady of the *pension* from which he had fled, who had been to her sister's house and seen the defendant. She immediately recognized him, investigated the man, in the efficient way of Madame Frenchwoman, and informed the police of the facts. The court made short shrift of this poor devil.

There is a great deal of riffraff that comes before the military courts which is sent to prison for the good of society. But there are others incarcerated who ought not to be. They ought to be sent to the front. Of course, military discipline is to be maintained. Of course, a person who is insubordinate will make a bad soldier. But after having viewed many people who come before the military courts, I believe that some convictions could well be avoided. For what is the result? A great many are sentenced to prison. They find there board, lodging, clothing, heat and almost all the comforts of life: compared to the service at the front most of these are in heaven. Who are those at the front? Some of the best blood of the nations. The reasons given for imprisonment, including the one that military service is honorable and is to be denied to felons, are fallacious. Because it is honorable to tell the truth, society does not prevent all except honorable men from telling the truth. A good quality may exist in a bad man. Again, the argument to the effect that evil communications corrupt bad manners can be made invalid by doing what is done in all countries—namely, by organizing convict battalions. The last fact is sufficient answer to the plea often heard that military service is too good for bad men.